

Spring 1974

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Recommended Citation

Curtis L. Mack, *Public Sector Collective Bargaining: Diffusions of Managerial Structure and Fragmentation of Bargaining Units*, 2 Fla. St. U. L. Rev. 281 (2014) .
<http://ir.law.fsu.edu/lr/vol2/iss2/3>

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PUBLIC SECTOR COLLECTIVE BARGAINING: DIFFUSION OF MANAGERIAL STRUCTURE AND FRAGMENTATION OF BARGAINING UNITS

CURTIS L. MACK*

I. INTRODUCTION

It is becoming increasingly clear that collective bargaining in the public sector has not functioned as smoothly as it has in the private sector. Perhaps the two major factors that have interfered with and impeded public sector collective bargaining are the diffusion of managerial authority at the state and local level and the excessive fragmentation of bargaining units.¹

In the private sector an employer is obligated to bargain with the majority union with respect to all matters affecting the terms and conditions of employment of the represented employees.² And, in the private sector, the obligation to bargain poses little problem because the employer, or its agent at the bargaining table, is usually the only source of authority that can effect any change in working conditions; accordingly, any agreement between an employer and a majority union becomes the "Law of the Shop." However, the premise that the bargaining agent or the employer who is obligated to bargain with the union has the exclusive authority to bargain with regard to all working conditions does not find support in the public sector. For example, the employing entity in the public sector may be the local school district or the local police department, which, under the applicable collective

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1. While public sector labor relations encompasses federal, state and municipal employees, this article will discuss the problem only as it relates to municipal employees and their employers; however, the reader should note that the problems discussed herein are not unique to labor relations at the municipal level, but are prevalent at the state and national level as well.

2. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1970), provides that to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party

The Act also states that it is an unfair labor practice for an employer to refuse to bargain collectively with a union chosen by a majority of the employees. 29 U.S.C. § 158(a)(5) (1970). For cases construing these cornerstone provisions of private sector collective bargaining, see, *e.g.*, *Fiberboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964); *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); *General Electric Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969).

bargaining statute, is obligated to bargain with the union. Yet, there are other segments of government, created by legislative fiat, that without first consulting the employing entity or the majority union enjoy power to promulgate rules and regulations which can, and often do, affect working conditions.

These legislatively-created agencies include the state civil service commission, budgeting departments and other municipal and state legislative arms, each having authority to alter existing work practices that the unions have secured with valid collective bargaining agreements. The term "absent employers" may be used to characterize governmental agencies with authority to enact or change rules and regulations that affect the terms and conditions of employment, but without the concomitant obligation to bargain with the majority union. Since "absent employers" exist in a majority of the states, it may be concluded that the resulting diffusion of managerial authority has substantially inhibited collective bargaining in the public sector. With neither the "real employers"³ nor the unions precisely knowing their respective rights and obligations, the resulting uncertainty raises serious problems in the areas of contract negotiation, scope of bargaining and contract administration. Several ramifications of the problems raised in these areas will be discussed in the first part of this article.

The second factor that has adversely affected collective bargaining in the public sector is fragmentation of bargaining units. In both the private and public sector "unit determination" is of vital importance. It is important to the unions and the employers because

[i]n the private sector, it is clear that the scope and nature of the unit found to be appropriate for bargaining has acted as an important determinant of the union's basic economic strength—that is, its bargaining over bread-and-butter economic issues. In the public sector, it seems clear that the scope and nature of the unit found to be appropriate will also affect the range of subjects which can be negotiated meaningfully, the role played in the process by the separate branches of government, the likelihood of peaceful resolution of disputes, order versus chaos in bargaining, and ultimately, perhaps, the success of the whole idea of collective bargaining for public employees.⁴

Moreover, an improper unit determination can adversely affect the employer's use of its human resources. If the unit is defined too

3. For the purpose of this article "real employer" refers to the governmental entity that is obligated by statute to bargain with the union.

4. Rock, *The Appropriate Unit Question in the Public Service: The Problem of Proliferation*, 67 MICH. L. REV. 1001 (1969).

narrowly, for example, the employer may encounter problems in promoting employees to higher paying positions or in complying with Title VII mandates to upgrade minority employees.

Despite the existence of factors that seem to favor a broad bargaining unit, some public employers have opted for small units.⁵ The result has been to carve several bargaining units out of a group of employees which logically should be included in one broad unit. Perhaps public employers have viewed unit fragmentation as one method of minimizing the bargaining strength of the union; for them, unit fragmentation has served as an anti-union device, deliberately developed. The second part of this article will discuss the problems inherent in unit fragmentation, and will indicate how the doctrine has been used by unions *against* the employers who created it. Initially, however, some brief comments regarding the historic factors which gave rise to public sector unionism are required.

The Rise of Unionism in the Public Sector

The right to engage in collective bargaining in the private sector has been well established for more than a quarter of a century.⁶ In some quarters, however, the right to engage in collective bargaining in the public sector remains debatable. In fact, many public officials are unwilling to devise a bargaining scheme that will permit collective bargaining to become a reality for public employees.⁷ But the failure by most state legislatures to accord public employees the same bargain-

5. The City of Milwaukee, for example, has separate units of nurses, physicians, dentists, engineers and psychiatric personnel. The units range in size from 2,800 employees of the Department of Public Works to four employees of the Election Commission. Shaw & Clark, *Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems*, 51 ORE. L. REV. 152, 155 (1971).

6. For a historical development of the private employee's right to bargain collectively, see A. COX, *LAW AND THE NATIONAL LABOR POLICY* (1960); F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* (1930); H. MILLIS & E. BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* (1950); H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* (1968). For a compilation, with commentary, of the federal legislation establishing the private sector employees' right to bargain, see *STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATION* (R. Koretz ed. 1970).

7. See *Dade County Classroom Teachers' Ass'n v. Ryan*, 225 So. 2d 903 (Fla. 1969), where the state supreme court cautioned the legislature that its failure to enact an appropriate public sector labor relations statute would compel the court to devise a bargaining scheme. The court subsequently appointed the Supreme Court Public Employees' Rights Commission to suggest interim guidelines for the implementation of collective bargaining for public employees until such time as the legislature acted to fulfill the mandate of the state constitution. See *City of Miami Springs v. State ex rel. Fraternal Order of Police, Lodge No. 11*, Case No. 43,454 (Fla., Nov. 28, 1973) (order appointing commission). The provision in the state constitution places public employees' right to bargain on an equal basis with that of private employees. See FLA. CONST. art. I, § 6.

ing rights enjoyed by their brethren in the private sector has not acted as a deterrent to the growth of public sector unionism. In recent years, the growth of unionism in the public sector has far exceeded that occurring in the private sector.⁸ Consequently, this rapid growth has compelled many public officials to cast aside outdated notions that labor unions and collective bargaining are at variance with efficient government and, therefore, detrimental to the political process.⁹ To date, more than thirty-four states have enacted some type of bargaining scheme permitting public employees to engage in collective bargaining.¹⁰

In addition to expressing open hostility to public sector unionism, many public officials have been of the opinion that public employees have little or no need to organize and bargain collectively.¹¹ They have

8. An examination of the statistics indicates the rapid growth in public sector unionism. At the end of 1971, there were over 2.6 million members in state and local unions as compared to 1 million in 1960. The net increase of members in all unions, public and private, was 1.8 million persons between 1958 and 1968. Of this number, over 1 million were public sector employees. Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357 (1972). See also 2 ABA LABOR RELATIONS LAW 251-77 (1972); Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891, 918 (1969).

9. For an example of the initial, now discredited, judicial treatment of public employee bargaining, see *Hagerman v. City of Dayton*, 71 N.E.2d 246, 254 (1947), where the court held:

There is no authority for the delegation either by the municipality or the civil service appointees of any functions to any organization of any kind. Each tub must stand on its bottom. The law provides for the election and appointment of officials whose duties would be interfered with by the intrusion of outside organizations.

10. For an exhaustive compilation of the state statutes, see Blair, *State Legislative Control Over the Conditions of Public Employment: Defining the Scope of Collective Bargaining for State and Municipal Employees*, 26 VAND. L. REV. 1, 3-4 n.18 (1973). The structure of public employee collective bargaining varies throughout the states. The statutes may be divided into two general groups: "collective negotiations" and "meet and confer" statutes. The former more closely approximate the definitions and duty to bargain found in the NLRA. The "meet and confer" statutes permit more discretion on the part of the public employer and consequently the parties do not meet as equals at the bargaining table. For a comprehensive examination of the differing types of statutes, see Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 895-99 (1973); Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 365-73 (1972). A majority of the statutes define "bargaining" as a good faith attempt to resolve differences. See statutes compiled in Blair, *supra* at 3-4 n.18.

11. Any attempt by public employees to organize and bargain collectively with their employers was viewed as detrimental to the sovereign and constituted grounds for the employees' discharge. 1959 Fla. Att'y Gen. Op. 059-164; 1966 Ind. Att'y Gen. Op. 144; 1946 Ind. Att'y Gen. Op. 224. See also *Fellows v. LaTronica*, 377 P.2d 547 (Colo. 1962); *Board of Regents v. Packing House Workers Local 1258*, 175 N.W.2d 110 (Iowa 1970); *City of Springfield v. Clouse*, 206 S.W.2d 539 (Mo. 1947). But cf. *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968), which held that public employees have a

assumed incorrectly that the well-being of public employees is a concern of the states and not of the unions. This protective attitude eventually led to the creation and expansion of the role of state civil service commissions.¹² Thus, in addition to their traditional functions, civil service commissions were further vested with the authority to promulgate rules and regulations pertaining to both wages and conditions of employment. It became increasingly clear, however, that the roles of the civil service commissions and other state agencies were and continue to be in direct conflict with the concept of collective bargaining. Furthermore, there are some state statutes and ordinances in direct conflict with the collective bargaining statute.¹³

II. WHO IS OBLIGATED BY STATUTE TO BARGAIN?

The inability of unions, state labor boards and the courts to identify readily the "real employer" is one of the major problems in public sector collective bargaining.¹⁴ It is virtually impossible to define, with any meaningful certainty, the employer's obligation to bargain or the

constitutional right under the first amendment to form, join or support a labor organization.

12. Around the turn of the 20th century, many political reformers were of the opinion that civil service legislation was necessary to eliminate the spoil and political patronage involved in public employment. They believed that hiring, promoting and conditions of employment should be determined on individual merits and qualifications, not political affiliation. Moreover, it was felt that public employees should be protected from politics. R. HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 168-183 (1963). During the 1930's the public sector unions supported the civil service systems. *Project: Collective Bargaining and Politics in Public Employment*, 19 U.C.L.A.L. REV. 887, 917 (1972). However, as labor unions increased their numbers and received recognition from public employers as the lawful bargaining agents for public employees, civil service systems came to be viewed unfavorably. Stanley, *What Are Unions Doing to Merit Systems*, 31 PUB. PERSONNEL REV. 108 (1970); Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 861 (1970). They point out that "[n]ot infrequently, however, the civil service has become encrusted with bureaucratic barnacles, and frequently its administration complicates the achievement of a rational regime of collective bargaining." *Id.* at 861. This problem has been resolved in Michigan. In *Civil Serv. Comm'n v. Board of Supervisors*, 184 N.W.2d 201 (Mich. 1971), the court held that the collective bargaining statute had precedence over any civil service rules or regulations pertaining to collective bargaining.

13. *E.g.*, Michigan Home Rule Cities Act, MICH. COMP. LAWS ANN. §§ 117.1-38 (1967), *as amended*, (Supp. 1973). *See also* City of Flint, 5 Michigan Employment Relations Commission Labor Opinions 348, 360 (1970) [hereinafter cited as Mich. E.R.C. Lab. Op.]; City of Detroit, 6 Mich. E.R.C. Lab. Op. 237 (1971). Despite a specific statutory provision giving precedence to all state statutes or ordinances in conflict with the collective bargaining statute, *see* MASS. ANN. LAWS ch. 149, § 178N (Supp. 1972), the Massachusetts courts have used a case-by-case approach to give meaning to the collective bargaining provisions. *Norton Teachers Ass'n v. Town of Norton*, 279 N.E.2d 659 (Mass. 1972); *Mendes v. City of Taunton*, 303 N.E.2d 131 (Mass. App. Ct. 1973).

14. *See, e.g.*, WIS. STAT. ANN. § 111.81(16) (Supp. 1973), which defines the employer only as the State of Wisconsin.

scope of bargaining until the employer is identified. Without some clarification, a statutory mandate purporting to obligate the employer to bargain in good faith with the union, concerning wages, hours and other terms and conditions of employment, will remain an illusion.

Managerial authority in the public sector is diffused: several independent arms of government are legally obligated to effect terms and conditions of employment. For example, the immediate employers (sheriffs, judges, fire chiefs or department heads) must determine non-economic aspects of working conditions such as reporting time, vacation, workload, hiring and firing, and methods by which the work will be performed. The city mayor must then formulate the overall budget for the entire governmental unit, and the city legislative body ultimately must appropriate funds to implement any bargained-for wage increases.¹⁵ This multi-faceted procedure raises the question of which of these entities is obligated to bargain with the union. Does the obligation attach to the legislative body, the mayor or the head of each department?

Since a majority of the state statutes define bargaining as a good faith attempt by unions and employers to resolve their differences, a statutory definition of the "real employer" is essential in determining which of the governmental entities is statutorily mandated to bargain. As Professor Edwards has observed: "One element of good faith bargaining is the presence of bargaining representatives on both sides of the negotiating table who have the authority to make genuine proposals."¹⁶ Consequently, there can be no good faith negotiations "if the representative of the public employer lacks even the authority to arrive at a *conditional* agreement."¹⁷ One approach to the problem might well be a determination that the separate entities are engaged in the joint venture of carrying out the mission of the municipality and are, therefore, joint employers for the purpose of collective bargaining. Thus, all would be obliged to bargain in good faith.

In spite of the problems arising in the absence of a concise statutory definition of the "real employer," a majority of the state legislatures still have failed to provide either definite answers or suggestive guidelines.¹⁸ Rather, they continue to assume erroneously that, after the

15. See *City of Detroit*, 6 Mich. E.R.C. Lab. Op. 237 (1971).

16. Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 MICH. L. REV. 885, 904 (1973).

17. *Id.*

18. A recent amendment to Michigan's statutes defines the employer as "a person . . . and includes any person acting as an agent of an employer." MICH. COMP. LAWS ANN. § 423.2F (Supp. 1973). This new statute does not help to alleviate the problem faced in *Board of Comm'rs, GOVERNMENT EMPLOYEE RELATIONS REPORT No. 408*, at B-1 (Mich. E.R.C., June 4, 1971) [hereinafter cited as G.E.R.R.]. See pp. 287-88 *infra*.

bargaining obligation is set forth, the inclusion of the word "employer" in the statute provides sufficient clarity. They further assume that any problem arising because of statutory vagueness can be resolved through state labor boards and state courts that rely on the private sector's definitions of "employer."

The assumption that state labor boards and state courts can secure guidance by looking to the private sector's model does not survive careful scrutiny, since the latter's definition of employer is of dubious value in the public sector: that definition neither compels nor suggests an answer to the question of to whom does the bargaining obligation attach. The overlapping functions of many state and municipal arms of government forestall comparisons between the use of the term "employer" in the public and private sectors. For example, in the private sector the bargaining obligation is placed upon the employing entity that has the *ultimate* "authority to hire, discipline, and discharge" the employees;¹⁹ but, in the public sector, a determination of who has the authority to hire, discipline and discharge is not dispositive of the issue. A definitive conclusion cannot be reached until it is determined which of the municipal entities has the authority under general state law to promulgate rules and regulations pertaining to the matter in dispute. The question then becomes whether the term "employer" in the public sector, by implication, refers to "the decision-making authorities of government, both the legislative and executive, who can grant or deny what the union wants."²⁰ If answered positively, the good faith obligation would attach to the "legislative body enacting a pension plan, or the park superintendent approving a change in work shifts, or a foreman settling a minor grievance."²¹

The need for a legislative definition of employer is well illustrated by *Monroe County Board of Commissioners*,²² decided by the Michigan Employment Relations Commission (MERC). There, the county commissioners commenced negotiation of a collective bargaining agreement with the union covering all county employees, including non-judicial employees working for the courts. Ignoring MERC's prior determination that the appropriate unit was county-wide, the judges took the position that the county commissioners lacked the authority to negotiate a collective bargaining agreement for individuals em-

19. See *Musicians Local 802*, 176 N.L.R.B. 198, 199 (1969); *accord*, *Musicians Local 802*, 171 N.L.R.B. 1100 (1968).

20. D. STANLEY & C. COOPER, *MANAGING LOCAL GOVERNMENT UNDER UNION PRESSURE* 20 (1972).

21. *Id.*

22. G.E.R.R. No. 408, at B-1 (Mich. E.R.C., June 4, 1971).

ployed by the court.²³ On that basis, the judges ordered the commissioners to cease negotiating with the union regarding matters affecting individuals so employed. The commissioners subsequently refused to negotiate with the union with respect to matters affecting non-judicial court personnel. Charging the commissioners with bad-faith bargaining, the union filed an unfair labor practice charge. MERC held that the county was the sole employer of all employees, including those employed by the courts, and that the commissioners were, therefore, obligated to bargain with the union.²⁴

The decision reached by MERC evinces almost total disregard for the non-economic issues involved in collective bargaining. MERC reasoned that any collective bargaining agreement could obligate the employer to pay higher wages and that only the county commissioners, as the legislative body, could appropriate the funds required to implement the agreement.²⁵ Thus MERC held that only the legislative arm of a county was statutorily obligated to participate in the bargaining process.²⁶

The agency emphasized that, "unless the entity supplying the funds is at the bargaining table and has ultimate responsibility for carrying out any agreement reached,"²⁷ collective bargaining would be meaningless to the employees. Thus, MERC concluded that the county, not the court or the judges, was the employer and that to hold otherwise would separate contract negotiation from contract administration. The resulting decision thus relegated the judges to the status of supervisors or "official" onlookers.²⁸

In *Monroe County* MERC attached importance to only one aspect of collective bargaining: the economic issues. In ignoring the judges' authority to promulgate rules pertaining to day-to-day working conditions of their employees, the decision hardly enhances the bargaining process. That the judges do not appropriate funds for salaries should not necessarily bar them from participating in the bargaining process. On the contrary, as a matter of both practice and law, the judges had sole authority over matters fundamental to working conditions. They, not the county commissioners, determined such matters as work load and the manner in which their employees were required to perform assigned tasks. Thus, excluding the judges from the bargaining table made effective labor-management relations more difficult.

23. *Id.*

24. *Id.* at B-3.

25. *Id.* at B-2.

26. *Id.*

27. *Id.* at B-3.

28. *Id.*

A more practical and sound decision would have held that the county commissioners and the court were joint employers, thereby obligating both entities to bargain in good faith with the union. Such a result also would have enabled other departments within the county (unable, like judges, to order a cessation in bargaining) to claim coequal status with the judges and county commissioners as employers. In that case, requiring the union to participate in bifurcated bargaining with the departments for working conditions and with the commission for wages and benefits would not appear unreasonable.

The practicality of the joint-employers approach is best illustrated in *County of Ulster v. Civil Service Employees Association*.²⁹ The New York Public Employment Relations Board (PERB), relying on two factors—financial control and day-to-day supervision of the represented employees—identified both the county and its sheriff as employers. The appellate court observed that, though the county provided the operating funds for the sheriff's office, the employees were "hired and fired by the sheriff, and he determined all terms and conditions of their employment other than salary, such as work assignments, work schedules, time off and overtime."³⁰ Hence, the court found in this ample support for PERB's finding of joint employers.

The decision by the New York court correctly places the good faith bargaining obligation on both parties; accordingly, they are both obligated to approach the negotiating table with a sincere desire to resolve their differences with the union. But, more importantly, PERB and the court recognized and dealt with the problem of managerial diffusion.

In view of legislative inaction, the arduous task of resolving conflicts that arise from managerial diffusion has been thrust upon state courts and state labor boards. The decisions reached by the state boards and courts are inconsistent both from a legal and doctrinal standpoint. They have attempted to resolve, through the decisional process, matters that lend themselves to a more effective solution through legislative fiat.³¹

A. The Scope of Bargaining

In the private sector, the scope of bargaining is defined in very general terms. Section 8(d) of the National Labor Relations Act (NLRA) directs the employer to bargain with the majority union over

29. 326 N.Y.S.2d 706 (App. Div. 1971).

30. *Id.* at 708.

31. See generally T. KOCHAN, RESOLVING INTERNAL MANAGEMENT CONFLICTS FOR LABOR NEGOTIATION (Public Employee Relations Library No. 41, 1973); Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 861 (1970).

"wages, hours, and other terms and conditions of employment."³² With the bargaining obligation stated in very general terms, management and labor were unable to decide which matters should be resolved through collective bargaining and which matters were within the exclusive prerogative of management. Consequently, clarification was sought from the National Labor Relations Board (NLRB).³³

In approaching the problem, the Board observed that the issues confronting the parties were (1) mandatory subjects (those matters substantially affecting the employees and their job security, and which were, therefore, embraced in Section 8(d) of the NLRA)³⁴ and (2) permissive subjects (matters having only marginal impact on job security, and concerning which the employer is not required to bargain).³⁵ As with most general rules, there are exceptions. These exceptions have evolved as a result of the NLRB's and the federal courts' finding that, while some matters do have a direct and substantial impact on job security, they are so complex and subjective that it would be unfair to compel employers to bargain over them with the unions. In this category of purely managerial decisions are issues relating to capital investments and plant closures.³⁶

While the general definition of the scope of bargaining in the private sector has been useful in that it permits the NLRB and the courts to decide each case on its peculiar facts, it will not work well in the public sector where diffusion in managerial structure and inability to identify employers effectively prevent useful comparisons between the two models.

Identifying the "real employer" is a prerequisite to defining the scope of bargaining. In the public sector, for example, matters which fit neatly into the private sector's definition of mandatory subjects may be within the exclusive jurisdiction of a governmental entity that is not at the bargaining table. Nevertheless, many public labor boards and state courts have attempted to adopt the private model.

A good example of such an attempt by a state board is the case of

32. 29 U.S.C. § 158(d) (1970).

33. *See, e.g.*, *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952); *Stonewall Cotton Mills v. NLRB*, 129 F.2d 629 (5th Cir. 1942).

34. *See, e.g.*, *NLRB v. J.H. Allison & Co.*, 165 F.2d 766 (6th Cir. 1948); *Shell Oil Co.*, 77 N.L.R.B. 1306 (1948).

35. *See NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

36. *See NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933 (9th Cir. 1967); *accord*, *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965); *Jays Foods, Inc. v. NLRB*, 292 F.2d 317 (7th Cir. 1961). Nevertheless, the employer must bargain with the union over the effects of the decision to close the plant. *See General Motors Corp.*, 77 L.R.R.M. 1537 (1971).

Westwood Community Schools.³⁷ The Michigan Employment Relations Commission (MERC) agreed with the union's contention that the opening day of school was a mandatory subject of collective bargaining and was a term and condition of employment; accordingly, MERC rejected the school board's argument that to bargain over the issue would adversely affect the state's desire to educate its children.³⁸ This decision was consistent with MERC's earlier holding that mandatory subjects of collective bargaining included vacations and holiday pay for teachers.³⁹

While the Michigan approach in *Westwood* is consistent with the private model,⁴⁰ some states have rejected the NLRB's definition of mandatory subjects. In doing so, these states have attempted to rest their decisions on rather subtle and insignificant language contained in their state statutes. *Education Association v. Decourcy*⁴¹ illustrates this approach. In *Decourcy*, the Connecticut Supreme Court concluded that neither the length of the school day nor the school year was a term and condition of employment; consequently, they were not bargainable issues. In reaching its decision, the court conducted a detailed analysis of the private sector's definition of working conditions and concluded that under the private model, both issues would be deemed mandatory subjects.⁴² The court stressed, however, the absence of the word "hours" in the state statute, and it noted that such omission evidenced a legislative intent to place the school day and the school year beyond the scope of collective bargaining.⁴³

In setting forth the precedential value of its *Decourcy* decision, the court held that the test to be applied is whether the matter in dispute is a term and condition of employment or educational policy.⁴⁴ Issues falling in the latter category would not be negotiable. In spite of such an emphatic enunciation, however, the test stated does not resolve the problem regarding the scope of bargaining. Rather, it merely restates the question raised by the parties at the negotiating table: What is a term and condition of employment?

The circular manner in which the *Decourcy* test was stated does not permit the state labor board to decide future disputes with cer-

37. 7 Mich. E.R.C. Lab. Op. 313, 317 (1972).

38. *Id.* at 317-20.

39. Reese Public School Dist., 2 Mich. E.R.C. Lab. Op. 489 (1967).

40. One commentator suggests that under *Westwood*, the scope of bargaining in the public sector may be broader than it is in the private sector. Edwards, *supra* note 16, at 923.

41. 295 A.2d 526 (Conn. 1972).

42. *Id.* at 533-34.

43. *Id.* at 534.

44. *Id.* at 535-36.

tainty or consistency. The *Decourcy* court, relying on its own test, held that workload and class size were mandatory subjects of collective bargaining. Indeed, the court dismissed the argument that such issues were not bargainable with the observation that "the legislative intent is clear."⁴⁵ The test enunciated by the court, however, is so general that it could have been used to support an opposite conclusion.⁴⁶

In the absence of legislative guidance, it is difficult for a state court or agency to promulgate a general rule broad enough to encompass the entire "scope of bargaining" issue. Some states continue to make the effort. In *Labor Relations Board v. Richland School District*,⁴⁷ the board adopted a very broad test for defining the scope of bargaining: If the issue in dispute is one that is within the control of a branch of government that is removed from the bargaining process, then it is a matter of policy and is not negotiable; on the other hand, if the dispute concerns an issue within the control of the employing entity and directly affecting employees, the issue is within the discretion of the local management and is, therefore, subject to the bargaining process.⁴⁸ Relying on that test, the board held that matters such as sick leave, compensation for teachers with occupational diseases, paid absences for court attendance and paid absences for family illness were proper subjects of collective bargaining.⁴⁹

While resolution of both the Michigan and Pennsylvania cases required the commissions to define the scope of bargaining, that was not the sole issue raised. The broader issue raised in these cases involved the extent to which agencies that were not employers within the meaning of the applicable statutes could promulgate rules and regulations affecting working conditions without bargaining or consulting with

45. *Id.* at 537.

46. See Board of Educ., 4 N.Y. Pub. Employment Rel. Bd. 3725, *aff'd on rehearing*, 4 N.Y. Pub. Employment Rel. Bd. 3753 (1971) [hereinafter cited as N.Y.P.E.R.B.] where PERB held that class size was not a mandatory subject of bargaining. See also *City School District*, 4 N.Y.P.E.R.B. 4654 (1971). In that case PERB held:

In determining whether or not a subject is a mandatory subject of negotiations, it is necessary to strike a proper balance between the duty of government officials to make decisions directly affecting its basic mission, and the statutory right of employees to negotiate items which are terms and conditions of employment.

Id. (footnotes omitted).

On the basis of the above test PERB has held that the number of firemen required to operate a piece of firefighting equipment is a mandatory subject of bargaining. C.H.S.D. No. 1, Valley Stream, 5 N.Y.P.E.R.B. 3113 (1972). In *City School District*, 5 N.Y.P.E.R.B. 3023 (1972), PERB held that the work year was a mandatory subject of collective bargaining.

47. G.E.R.R. No. 485, at B-3 (Pa. L.R.B. Jan. 8, 1973).

48. *Id.* at B-4.

49. *Id.*

the unions that represented the affected employees. Both the Michigan and Pennsylvania employers had refused to bargain over certain issues purportedly because they were within the exclusive regulatory scheme of other state agencies. Thus, while the scope of bargaining was broadened, neither decision gave the parties any instructions or guidance for dealing with the absent governmental agencies, such as civil service commissions or other agencies which enact rules affecting employment conditions.

The authority of the absent agencies to formulate rules and regulations affecting terms and conditions of employment remained intact. The Pennsylvania holding obligated only the local school district to bargain over the discretion retained by it. Consequently, the state school board still could enact rules and regulations that would deprive the local board of its discretion over the disputed issue. Moreover, the Pennsylvania court specifically acknowledged the right of the other state agencies to remove from the bargaining process certain matters that pertained to working conditions of the represented employees.⁵⁰ Thus, it reasoned that matters such as formulation of the budget, utilization of technology, operational structure, and function and progression of employees were not within the meaning of "terms and conditions of employment." It cannot be over-emphasized that the right of a separate agency to control these matters will frustrate collective bargaining in the public sector. All of the exclusions enumerated in the *Richland* case have a direct and substantial impact on working conditions. Thus, this case offers compelling evidence that Pennsylvania has not completely adopted the private sector model. Had it done so, the Pennsylvania Board would have precluded both the immediate employer and other state agencies from instituting any changes in the terms and conditions of employment until the matter has been agreed to by the union or until a valid impasse had been reached.⁵¹

That the Michigan Commission has not fully adopted the private sector's definition of working conditions is also clear. It has specifically held that an agency that is not required to bargain with a union may alter terms and conditions of employment. For example, it rejected the union's contention that a "residency requirement" was within the

50. This action is similar to the Massachusetts statute, which ranks other state statutes and ordinances above the collective bargaining statute. See MASS. GEN. LAW ANN. ch. 149, § 178N (Supp. 1972); cf. *Norton Teachers Ass'n v. Town of Norton*, 279 N.E.2d 659 (Mass. 1972).

51. In *NLRB v. Katz*, 369 U.S. 736 (1962), the Court held that an impasse occurs when negotiations between union and employer reach a point where further bargaining would be fruitless. At that point, the employer may unilaterally institute new terms and conditions of employment.

meaning of the term "working conditions."⁵² MERC reasoned that there was no conflict between a municipal ordinance which required policemen and firemen to live in the city and a valid collective bargaining agreement. The principal objection raised by the union, and completely disregarded by MERC, was not that the regulation was inconsistent with a collective bargaining agreement, but that it was promulgated by the city without consulting the union. This decision is inconsistent with an earlier decision by MERC.⁵³

The interrelationship between managerial diffusion and the scope of bargaining in the public sector can be seen in *Chief of Police v. Town of Dracut*.⁵⁴ The issue raised in that case was whether the selectmen could revoke or modify a city ordinance which gave the chief of police the unlimited authority to regulate the working conditions of police officers employed within the department. After the union demonstrated its majority status, the chief of police rejected a request by the selectmen to negotiate with the union. The selectmen then negotiated a collective bargaining agreement with the union. They contractually agreed to give priority to seniority when granting vacations and job preference. The chief then challenged the contract on the theory that the selectmen had exceeded their authority. In the court's opinion, a resolution of the dispute required it to harmonize a statute giving the chief of police the authority to promulgate rules and regulations within the department and a statute giving the selectmen the authority to negotiate with the union.⁵⁵ In resolving the issue the court stated:

The several statutes involved in this case do not compel a conclusion that the total authority over the town's police department is

52. City of Highland Park, 7 Mich. E.R.C. Lab. Op. 292 (1972).

53. In City of Detroit, 6 Mich. E.R.C. Lab. Op. 237 (1971), the Commission rejected the employer's contention that the following items were not mandatory subjects of collective bargaining: (1) residence requirements for all police officers; (2) recruiting policies and (3) modifying an existing retirement plan. See also City of Flint, 5 Mich. E.R.C. Lab. Op. 348 (1970).

54. 258 N.E.2d 531 (Mass. 1970).

55. MASS. GEN. LAWS ANN. ch. 41, § 97A (1971), provides in part:

The chief of police in any such town shall from time to time make suitable regulations governing the police department, and the officers thereof, subject to the approval of the selectmen; provided, that such regulations shall become effective without such approval upon the failure of them to take action thereon within thirty days after they have been submitted to them by the chief of police.

MASS. GEN. LAWS ANN. ch. 149, §§ 178F-N (1971), as amended, (Supp. 1972), is the Massachusetts public employees collective bargaining act. Section 178I thereof provides: "In such bargaining other than with an employee organization for school employees, the municipal employer shall be represented by the chief executive officer."

vested in either the chief or in the board of selectmen. They give a measure of authority to each. . . .

. . . .

Most of the disputed articles require that the chief give exclusive consideration to the individual request, personal preference, seniority and rank of a police officer in determining assignment of duties, shifts, vacations and leaves of absence. It is probably the practice for chiefs of police to consider such personal factors in making such decisions, and to honor them if reasonable, practicable and consistent with the public interest and proper functioning of the police department. But, the fact that the chief, in his discretion, may consider these factors in making such decisions is very different from a contractual obligation that he be bound by such factors. Such a contractual obligation may not be uncommon in a collective bargaining agreement made by a private employer with his employees; but private employers are not subject to § 97A or any other comparable limitations on the authority to assign and control their personnel.

. . . In making assignments the chief must exercise his own discretion and judgment as to the number, qualifications and identity of officers needed for particular situations at any given time. He clearly has been given that authority by § 97A, and we cannot believe that the Legislature, in enacting provisions for collective bargaining by municipal employees, meant to take that authority away from the chief and permit the selectmen to bargain it away under the guise of negotiations on 'wages, hours, and other terms and conditions of employment.' To deprive the chief of his authority to assign his officers to their respective duties and to substitute therefor the disputed provisions of the agreement would be totally subversive of the discipline and efficiency which is indispensable to a public law enforcement agency. Thus, we conclude that those articles of the agreement which impinge upon the power and authority of the chief to decide duty, vacation and leave assignments are null and void as to members of the police department.⁵⁶

The court's holding in this case is a tacit rejection of public sector collective bargaining. There cannot be any collective bargaining if the employer (the selectmen) lacks the authority to bargain with the union over vacation and job preference. This case graphically illustrates how the diffusion of managerial authority in the public sector has impeded collective bargaining. Since the courts and state agencies cannot identify the "real employer,"⁵⁷ they constantly strive to reach a practical accommodation between the collective bargaining statutes

56. 258 N.E.2d at 535-37.

57. See note 3 *supra*.

and other more general statutes and ordinances pertaining to the operation of government. It can be argued, however, that in *Dracut* the Supreme Judicial Court of Massachusetts had no alternative, since the collective bargaining statute is specifically subordinated to other state laws.⁵⁸ If that is in fact true, then collective bargaining will forever remain illusory in Massachusetts.

Arguably, the structure of state and local government makes it impossible to prohibit the non-employing agencies from enacting rules and regulations that have an impact on terms and conditions of employment. The interrelationship and overlapping functions of such governmental agencies are too great and complex to permit the "immediate employers" to bargain with the unions over everything that affects working conditions. Consequently, each agency that has the authority to affect terms and conditions of employment must be made responsive to the rights of the employees to bargain over those matters. As a suggested minimum, each agency should be required to consult with the unions before implementing rules and regulations that affect organized employees.

How then can the diffusion of authority problem be resolved to give meaning to "working conditions," while still permitting state and local governments to perform their obligations to the public? Initially, the states should revise their public employees collective bargaining statutes with full recognition of the problem in mind. Any new statutes must indicate clearly what matters are beyond the scope of bargaining and what matters are reserved to the prerogative of public officials and the political process. Such action will be useless unless the states approach the problem objectively and with a clear intent to foster collective bargaining. Then, only a few issues will be beyond the bargaining process, and even these matters will not be unilaterally implemented if they have a substantial impact on the working conditions of represented employees.

At least two states have attempted to resolve the problem inherent in the diffusion of authority that exists in the public sector. In Maine the collective bargaining statute provides for both "pure collective bargaining" and "meet and confer."⁵⁹ Under the statute, the employer must bargain with the union over all matters pertaining to working conditions if to do so would not subvert the political process. If the matters in issue affect public policy more than "working conditions," they are not mandatory subjects of collective bargaining; nevertheless, the employers are obligated to "meet and confer" with the union before

58. Cf. *Norton Teachers Ass'n v. Town of Norton*, 279 N.E.2d 659 (Mass. 1972).

59. ME. REV. STAT. ANN. tit. 26, § 965(1)(c) (Supp. 1972).

instituting any changes that affect their employees. Hence the unions are given an opportunity to discuss with the employers alternative ways of implementing any new policies or rules that are enacted by the absent employer. Moreover, the employers and the unions can make joint recommendations to the appropriate agency suggesting ways to alter the new policies or procedures.

Additionally, under the Maine statute, the role of the civil service commission has been drastically reduced.⁶⁰ Its function is limited to formulating, administering and interpreting employment examinations. Hence, one major problem in public sector labor relations may have been put to rest—the right of the civil service commission to formulate rules pertaining to employment.

Hawaii has gone one step further than Maine. The Hawaii collective bargaining statute attempts to bring all parties to the bargaining table. After explicitly identifying the public employer,⁶¹ the statute specifically states who is directly obligated to bargain with the employees' representative.⁶² Presumably, the fact that every arm of government is involved in the negotiations precludes the public employer from formulating or supporting any legislation that is inconsistent with the collective bargaining agreement. Moreover, though the statute clearly defines which issues are beyond the "scope of negotiations,"⁶³ the parties are still obligated to "meet and confer" on such excluded items where they *have an impact* on working conditions. In part, the statute provides the following:

Except as otherwise provided herein, all matters affecting employee relations, including those that are, or may be, the subject of a regulation promulgated by the employer or any personnel director, are subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with the exclusive representatives prior to effecting changes in any major policy affecting employee relations.⁶⁴

60. ME. REV. STAT. ANN. tit. 26, § 969 (Supp. 1972).

61. HAWAII REV. STAT. § 89-2(9) (Supp. 1973) defines the employer as the governor in the case of the State, the respective mayors in the case of the city and county of Honolulu and the counties of Hawaii, Maui and Kauai, the board of education in case of the department of education, and the board of regents in the case of the university of Hawaii, and any individual who represents one of these employers or acts in their interest in dealing with public employees.

(Emphasis added.) Properly construed, this provision could eliminate the identity problem which has retarded collective bargaining in the public sector. More importantly, it resolves the "absent employer" problem because it compels state and local legislators and the civil service commission to participate in the negotiation.

62. See HAWAII REV. STAT. § 89-6(b) (Supp. 1973).

63. See HAWAII REV. STAT. § 89-9(d) (Supp. 1973).

64. HAWAII REV. STAT. § 89-9(c) (Supp. 1973).

This language appears sufficient to eliminate much of the conflict that exists within the public sector regarding the scope of bargaining.

A second approach to the problem of the scope of bargaining would be to adopt a general collective bargaining agreement setting forth in detail the purpose of the statute. Thus, if it becomes clear that the legislature intends to provide a pragmatic and comprehensive scheme permitting collective bargaining, the state labor board can harmonize the labor statute with other legislative provisions. This would prohibit state labor boards and state courts from automatically assuming that the specific statute providing for public sector collective bargaining is subordinate to other general statutes regulating state and municipal affairs.⁶⁵ Confronted with this scheme the state labor boards and the courts would resolve any statutory conflict on a case-by-case basis with clear legislative guidelines regarding the weight to be given to general legislative enactments that are inconsistent with the collective bargaining statute.⁶⁶

While a legislative resolution of the statutory conflict is desirable, legislative inaction is not always fatal. Many state labor boards and courts have attempted to resolve the conflict between the collective bargaining statute and general legislation. A good example of the approach can be seen by examining the Michigan collective bargaining statute and the decisions by MERC. In at least two specific instances, MERC has held that the labor statute takes precedence over other general legislation that tends to infringe upon the employees' right to engage in collective bargaining. In *City of Flint*⁶⁷ MERC held that the City of Flint could not rely on a general statute authorizing a home rule charter to avoid its obligation to bargain with the majority union.⁶⁸ Thus, the Commission held that the city could not institute a change in the prevailing wage rates without bargaining with the union. Similarly, in *City of Detroit*⁶⁹ the Commission held that the existence of a home rule charter provision did not relieve the employer of its obligation to bargain with the union regarding residency requirements and a pension retirement plan. MERC ruled in favor of the union in spite of a city charter provision which obligated the employer to present any change in the existing pension plan to the electorate by way of a referendum.⁷⁰ Through these cases, the

65. See notes 51-56 and accompanying text *supra*.

66. Hawaii has resolved this problem by specifically providing that the collective bargaining statute has priority over all conflicting legislation. See HAWAII REV. STAT. § 89-19 (Supp. 1973).

67. 5 Mich. E.R.C. Lab. Op. 348 (1970).

68. *Id.* at 349.

69. 6 Mich. E.R.C. Lab. Op. 237 (1971).

70. MICH. COMP. LAWS ANN. § 117.5(d) (1967), *as amended*, (Supp. 1973).

Michigan Commission served notice on public employers that they could not hide behind general statutory law to avoid their obligation to bargain with the union concerning mandatory subjects of collective bargaining.

The above cases illustrate a practical attempt by one state to harmonize general statutory law with specific legislation providing for collective bargaining. In reaching the decisions, the Commission relied on general principles of statutory construction. Its task was further facilitated by earlier decisions in the Michigan Supreme Court regarding statutory conflict.⁷¹

B. Contract Administration

The consummation of a collective bargaining agreement does not terminate the relationship between the employer and the union in the private sector.⁷² That same rationale is applicable to public sector collective bargaining. The contract is not self-implementing. There is a continuous need for both the union and the employer to have someone at the job site to give meaning to the agreement and to apply its terms to different problems and questions that arise thereunder. Most of the "real employers" have several operations, which makes it impossible for the managerial officials to be constantly present at each job site. The need remains, however, to have an employee who owes his primary loyalty to the employer at each job site to administer the agreement for the employer.

In the private sector, the collective bargaining agreement is administered by the foremen or other supervisory officials of the employer. The function has been deemed so vital in the private sector that the NLRB will not hesitate to find that the union committed an unfair labor practice if it attempts to interfere with the employer's agent in the administration of the collective bargaining agreement.⁷³ In both the public and the private sector, the unions nominate stewards to represent them at the job sites. It is the stewards' job to represent the employees in interpreting the collective bargaining agreement. Therefore, the public sector employer is at a decided disadvantage in contract administration if it does not have someone permanently at the job site to interpret the agreement.

71. *E.g.*, *Antrim County Social Welfare Bd. v. Lapeer County Social Welfare Bd.*, 50 N.W.2d 769 (Mich. 1952); *Winter v. Shafter*, 26 N.W.2d 893 (Mich. 1947).

72. *See Conley v. Gibson*, 355 U.S. 41 (1957).

73. *E.g.*, *Mailers' Union No. 18*, 172 N.L.R.B. 2173 (1968). The Board found that the union committed an unfair labor practice in pressing intra-union charges against a union member supervisor for acts committed in his capacity as a supervisor.

While the need for management officials at the job site is obvious, some states have taken the position that employers can administer the agreement without any job site officials. The New York statute provides that all employees except managerial officials shall be included in the bargaining unit.⁷⁴ In *Board of Education, Beacon Enlarged City School District*⁷⁵ PERB held that principals and assistant principals should be included in the same bargaining unit with other non-supervisory employees. In reaching that decision, PERB gave a very narrow interpretation to the statute. It reasoned that the principals were eligible to vote in the unit because they did not formulate policy, or "assist *directly* in the preparation for *and* conduct of collective negotiations," or play a "major role" in administering the agreement.⁷⁶ Accordingly, they were not managerial officials within the meaning of the New York statute. A narrow interpretation of the statute may be compatible with the intent of the New York Legislature, but the decision appears inconsistent with the concept of collective bargaining. The inclusion of principals and assistant principals in a non-supervisory employees bargaining unit causes problems for both management and labor. For example, the school board employer is deprived of the right to consult in confidence with the only individuals who could render advice on the feasibility of union demands, while the union must keep the principal and his assistant informed of their tactics and procedures, including slowdowns or work stoppages. Consequently, by failing to provide parties on both sides to administer the contract, the PERB decision permits a result incompatible with traditional concepts of the supervisory function in contract administration.

There are many examples of courts and agencies that have failed to realize that resolving grievances under the consummated agreement is a continuation of collective bargaining. In *PLRB v. Eastern Lancaster County School District*⁷⁷ the board specifically held that "first level supervisors" were not engaged in collective bargaining because they did not participate in the actual negotiation of the labor agreement.⁷⁸ The board also held that processing and settling of grievances was not an extension of collective bargaining.⁷⁹

If state agencies and state courts are de-emphasizing the need for continued negotiations by including supervisory employees in units

74. N.Y. CIV. SERV. LAWS § 201(7) (McKinney Supp. 1971).

75. 4 N.Y.P.E.R.B. 4344 (1971).

76. *Id.* at 4349-50; *accord*, Union Free School Dist. No. 13, 4 N.Y.P.E.R.B. 4310 (1971).

77. G.E.R.R. No. 477, at B-6 (Pa. L.R.B. Nov. 6, 1972).

78. *Id.* at B-7.

79. *Id.*

with the rank and file employees, what factors are determinative of who shall be included in a bargaining unit? This question was raised and answered in *Clifford W. Beers Guidance Clinic*.⁸⁰ When the union filed an election petition seeking a unit of eighteen employees, including four supervisors, the employers contested the unit sought on the theory that, under the statute, supervisory employees were not eligible to vote in an election with non-supervisory employees. Even though the Connecticut Labor Board concluded that the state act was similar to the NLRA, it held that the supervisors should be included in the unit with the rank and file employees.⁸¹ The Connecticut Board completely disregarded the grievance aspect of collective bargaining. Rather, it stressed that all employees with a community of interest should be included in the same bargaining unit. To support its conclusion that the supervisory and non-supervisory employees had a community of interest, the Board stressed that the relationship between the supervisors and non-supervisors was "intimate" and that there were no objections from the rank and file employees to the inclusion of the supervisors.⁸² Consequently, in the opinion of the Connecticut Board, the decisive factor in unit determination questions is the relationship between the respective groups of employees prior to the organizing campaign.⁸³ The Board, however, noted that it had some misgivings about the functions and propriety of such a unit.

The misgivings of the Connecticut Board were justifiable. When supervisors and non-supervisors are included in the same unit, it is difficult to achieve harmonious labor relations. The increase in the possibility of conflict and the decrease in the opportunity for harmonious collective bargaining is illustrated by the case of *City of Stamford*.⁸⁴ Supervisory and non-supervisory employees were included in the same bargaining unit, with the chief of police excluded as an official of management. The chief was not available for consultation during negotiation of the collective bargaining agreement, and the city legislature asked a captain in the department to sit with management at the negotiating table. The captain refused to comply with the request on the basis that to do so would be similar to negotiating against himself. The city then ordered the employee to act as a consultant for management. Following these events the union filed an unfair labor practice charge against the employer. The Connecticut Board held that

80. G.E.R.R. No. 493, at B-11 (Conn. Bd. Lab. Rel. March 5, 1973).

81. *Id.* at B-12, -13.

82. *Id.* at B-13, -14.

83. *Id.*

84. G.E.R.R. No. 472, at B-5 (Conn. Bd. Lab. Rel. Oct. 2, 1972).

the employer's action constituted an unfair labor practice. In reaching its decision the Board disregarded the employer's contention that technically the captain was a supervisor and an official of management.⁸⁵ In the opinion of the Board, an employer could not compel the employee to negotiate against his unit.⁸⁶

City of Stamford illustrates the problem inherent in the inclusion of supervisors and the supervised employees in the same bargaining unit. Moreover, it illustrates how management depends upon its supervisors for detailed information and consultation during the bargaining process. Consequently, if public sector bargaining is to accommodate the conflicting needs and desires of the parties, state statutes must adopt the preclusions of the NLRA.⁸⁷

When a public employer allows or is compelled by state law to allow his supervisors to join a union, he may expect difficulty in collective bargaining. First, the supervisory employees in the bargaining unit with other employees are forced to choose between allegiance to the union or to the employer. If such employees opt for the union, then the employer has no one at the job site to represent its interest in resolving the day-to-day problems that arise under the contract. On the other hand, if they opt for the employer, it is possible they will retard the efforts of the non-supervisory employees in forming or joining a union. As union members, the supervisory employees may engage in surveillance of other union members. That mere possibility has an intimidating effect on the rank and file employees. Secondly, the supervisory employees may be unduly influenced by the union. As with the high school principals in *Beacon Enlarged City School District*, such employees may permit the union to unduly influence them in preparing budgets and in making other recommendations. Finally, and most importantly, to bargain intelligently the employer needs someone at the job site who can apprise its negotiators of the more serious problems arising under the contract and suggest methods of resolution or elimination in future negotiations with the union. By including supervisors in the bargaining unit with other employees, the employer stifles its most valuable channel for securing pre-negotiation information. For these reasons supervisory employees should be excluded from the bargaining unit. Notwithstanding one author's observation that "the line between supervisors and employees in the public sector is not nearly so clear as it is in the private sector," and that "the interest

85. *Id.* at B-6

86. *Id.*

87. Supervisory employees are excluded from the protection of the National Labor Relations Act. See 29 U.S.C. § 152(3) (1970).

of the supervisors and the rank and file are closely entwined, if not identical,"⁸⁸ use of the criteria relied upon in the private sector to identify supervisors could facilitate the task of public sector employers.⁸⁹ It is not difficult to determine if an employee directs other employees, or if other employees and the employer look upon him as a supervisor. Since the hiring, firing and promotion of most public sector employees are determined by civil service rules and regulations, however, the private sector's requirement that a supervisor have the authority to hire and fire should be eliminated.

The problem inherent in including employees with supervisory authority in the bargaining unit with other employees, and the need to recognize their individual loyalty to the employer, has been recognized in New York. In *Union Free School District Number 5*,⁹⁰ PERB reversed its earlier narrow definition of managerial officials, announced in *Beacon Enlarged City School District*,⁹¹ and denied principals and assistant principals the right to join a union. Based upon the detailed testimony of the school superintendent,⁹² PERB concluded that the principals and their assistants played a major role in the preparation for negotiation and the administration of the completed agreement.⁹³ The Board considered these activities management-oriented and found that the collective bargaining process was better served by excluding the principals and their assistants from the bargaining unit.⁹⁴

If supervisory employees may not be included in bargaining units with non-supervisory employees, is the former's right to bargain collectively extinguished? The broad language of the state constitutions and statutes would indicate that the right remains.⁹⁵ The single measure taken by most states has been to preclude the mixing of supervisory and non-supervisory employees in the same unit.⁹⁶ Permitting

88. Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 368 (1972).

89. National Labor Relations Act § 2(11), 29 U.S.C. § 152(11) (1970), defines a supervisor as an

individual having authority, in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action

90. 5 N.Y.P.E.R.B. 4043 (1972).

91. 4 N.Y.P.E.R.B. 4344 (1971). See p. 300 *supra*.

92. 5 N.Y.P.E.R.B. at 4046.

93. *Id.* at 4047.

94. *Id.*

95. See, e.g., FLA. CONST. art. I, § 6; N.Y. CONST. art. I, § 17; MICH. COMP. LAWS ANN. § 423.8 (1967); PA. STAT. ANN. tit. 43, § 1101.401 (Supp. 1973).

96. See, e.g., HAWAII REV. STAT. § 89-6(a) (Supp. 1973).

supervisory employees to form their own bargaining unit would solve some of the problems in contract negotiation and give effect to the supervisory employees' right to bargain. In the event of a strike,⁹⁷ however, the employer may find that his unionized supervisors refuse to cross the picket line established by non-supervisory employees. One solution to this problem would be for public employers to adopt the private sector concept of a supervisory employee. In the private sector, these individuals are precluded from joining a union, and their initial and continued loyalty is to the employer. This suggestion may raise more problems than it solves, but appears preferable to unionizing supervisors.

III. BARGAINING UNIT FRAGMENTATION

Fragmentation of bargaining units means that the unions and employers have carved several bargaining units out of a group of employees that have a common interest and could logically be included in one large unit. As one commentator has observed, this practice can cause serious problems:

The more bargaining units public management deals with, the greater the chance that competing unions will be able to whipsaw the employer. Moreover, a multiplicity of bargaining units makes it difficult, if not impossible, to maintain some semblance of uniformity in benefits and working conditions. Unfortunately, in many states and localities bargaining units have been established without consideration of the effect such units will have on negotiations or on the subsequent administration of an agreement.⁹⁸

The purpose of this section is to discuss the factors that gave rise to unit fragmentation in the public sector, and to discuss the effect fragmentation has on the process of collective bargaining. Additionally, the action taken by some states to eliminate excessive bargaining unit fragmentation will be examined. Unit fragmentation in the public sector arose because of several factors. First, the states enacting public

97. The debate over whether public employees should be allowed to strike continues. In the interim, public employees have engaged in strikes with and without the presence of statutes prohibiting work stoppages. For a general discussion of the issues, see Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943 (1969); Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357 (1972); Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931 (1969); Stevens, *The Management of Labor in the Public Sector*, 51 ORE. L. REV. 191 (1971).

98. Shaw & Clark, *Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems*, 51 ORE. L. REV. 151, 152 (1971) (footnote omitted).

sector labor relations laws attempted to model them, to a great extent, after the NLRA.⁹⁹ The NLRB policy regarding unit determination was designed to permit the greatest degree of employee participation in the designation of the bargaining agent and to encourage participation in union affairs.¹⁰⁰ The implementation of this policy resulted in the presumption that a single plant or single store was the most appropriate unit.¹⁰¹

The Wisconsin Municipal Employees statute illustrates the adoption by a public employer of the NLRB approach. This statute provides:

In making such a determination [appropriateness of a particular bargaining unit], the commission may decide whether, in a particular case, the employes in the same or several departments, divisions, institutions, crafts, professions or other occupational groupings constitute a unit. Before making its determination, the commission may provide an opportunity for the employes concerned to determine, by secret ballot, whether or not they desire to be established as a separate collective bargaining unit.¹⁰²

This portion of the Wisconsin statute also charges the Wisconsin Employment Relations Commission (WERC) to avoid, wherever possible, the fragmentation of bargaining units.¹⁰³ As a result of encouraging employee participation in the selection of a union, it is conceivable that a bargaining unit, to some extent, may be determined by the union's organizational activity. In the private sector, a bargaining unit determined by the extent and intensity of the union's organizational campaign has been specifically rejected.¹⁰⁴ Naturally, there is no reason for the unions to attempt to organize in one campaign all those employed by a municipality. Rather, the unions could complete unionization by successively organizing small units of em-

99. See, e.g., MICH. COMP. LAWS ANN. §§ 423.1-311 (1967); MINN. STAT. ANN. §§ 179.61-77 (Supp. 1974); N.Y. CIV. SERV. LAW §§ 200-14 (McKinney 1973); PA. STAT. ANN. tit. 43, §§ 1101.101-2301 (Supp. 1973); WIS. STAT. ANN. §§ 111.01-.97 (1974).

100. See *Parsons Investment Co.*, 152 N.L.R.B. 192 (1965); *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409 (1950).

101. *Marks Oxygen Co.*, 147 N.L.R.B. 228, 230 (1964).

102. WIS. STAT. ANN. § 111.70 (4) (d) (2a) (1974).

103. WIS. STAT. ANN. § 111.70 (4) (d) (2a) (1974).

104. National Labor Relations Act § 9(c)(5), 29 U.S.C. § 159(c)(5) (1970), provides, *inter alia*, that the extent to which employees have organized shall not be used as the controlling factor in bargaining unit determination. See *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965); *NLRB v. Quaker City Life Ins. Co.*, 319 F.2d 690 (4th Cir. 1963).

ployees. Because the statute allows the unions to organize small groups, unit fragmentation in Wisconsin is common practice.¹⁰⁵

The second factor that has resulted in excessive bargaining unit fragmentation in the public sector has been the failure or inability of unions and employers to identify the "real employer." Both parties have attempted to identify the employer by payroll records and job classification, completely ignoring similar interests and goals among groups of employees.¹⁰⁶

Unit fragmentation has operated to the employer's detriment for three reasons. First, it has prevented employers from making the most effective use of their work forces, for example, by transferring employees from one job classification to another and by promoting employees to higher paying positions within the job classification. While this problem is extremely complex when one union represents several units of employees performing the same type of work, the employer's problem becomes even more acute when the various units of employees are represented by different unions.¹⁰⁷

Secondly, the presence of several unions within one installation has resulted in inflated wages for public employees. As each union attempts to increase its membership and sphere of influence, it naturally tends to concentrate its efforts in areas where the results are most visible—increased wages and fringe benefits. As a result, the employer is confronted with continually escalating demands for higher wages and greater benefits. The employer may attempt to minimize this effect by bargaining simultaneously with all the unions; however, such group bargaining may become unmanageable before agreement on a new contract is reached.¹⁰⁸

105. See Shaw & Clark, *supra* note 98, at 154-56.

106. See, e.g., Lansing School Dist. Bd. of Educ., 7 Mich. E.R.C. Lab. Op. 264 (1972). MERC held that all adult-education teachers constituted one bargaining unit and that regular kindergarten through twelfth grade teachers constituted a separate unit.

107. See Shaw & Clark, *supra* note 98, at 174. In Herman Keifer Hospital, 7 Mich. E.R.C. Lab Op. 685 (1972), 12 separate unions represented 450 non-supervisory employees of a public health complex. As the city phased out the operation of a communicable disease center, it transferred employees represented by one union to a unit within the complex where employees were represented by another union. All of the employees involved performed similar work in the separate departments of the complex. In the face of an unfair labor practice charge filed by the union whose members were being transferred, MERC upheld the employer's ability to effect the transfers even though the result would be decimation of the charging union. 7 Mich. E.R.C. Lab. Op. at 696. MERC also found that the organization of employees by specific job classification in each department of the hospital, rather than by generic function throughout the complex, was the primary cause of the overlapping bargaining units. 7 Mich. E.R.C. Lab. Op. at 695. The case illustrates the complex problems presented when two unions represent employees who do similar work.

108. See Shaw & Clark, *supra* note 98, at 174 n.148.

Finally, with the appearance of the traditional private sector unions in public sector collective bargaining, the small bargaining unit strategy works against the employer. In times of industrial warfare, there is a great deal of assistance between unions, often manifested by one union's refusal to cross a valid picket line of a sister union. Mutual assistance between unions has permitted small units of employees to exert a degree of influence incompatible with their actual bargaining strength. As a practical matter, each small unit of employees has sufficient power to bring the employer's operation to a virtual standstill. Since the collective bargaining agreements may expire at different times, the public employer may be confronted with several major interruptions during the course of a year.

Naturally, the deleterious effects of unit fragmentation in public sector bargaining are being reconsidered by some states. Many states are attempting to enlarge the scope of the bargaining units by statute.¹⁰⁹ In Hawaii, for example, the statute provides that all state and municipal employees be organized into a maximum of 13 bargaining units.¹¹⁰ Some state legislatures, however, have failed to take any action regarding the unit fragmentation problem. The task of enlarging the bargaining units has been thrust upon the state labor relations boards. In *Township of West Bloomfield Police Department*¹¹¹ MERC dismissed a union's petition requesting a unit of six dispatchers in the police department. It held that because the dispatchers performed a great deal of clerical work, they were akin to secretaries. Observing that there were other unrepresented secretaries in the building, MERC concluded that an appropriate unit would be all secretaries employed in the building.¹¹² Similarly, in *Albion Community Hospital*¹¹³ MERC dismissed a petition that sought to separate the licensed practical nurses from a large unit of nurses. It held that the unit sought to be established was not coextensive with the certified appropriate bargaining unit.¹¹⁴

Moreover, MERC has rejected job classifications as a relevant factor in determining an appropriate bargaining unit. In *Eastern Michigan University*¹¹⁵ a combination of the teaching faculty and non-teaching

109. See, e.g., PA. STAT. ANN. tit. 43, § 1101.604 (Supp. 1973). In pertinent part, the statute provides that the state labor relations board should consider employees' mutual interests in determining bargaining units, but the board is instructed to create units corresponding to the employer's organization of the employees.

110. HAWAII REV. STAT. ANN. § 89-6(a) (Supp. 1973).

111. 7 Mich. E.R.C. Lab. Op. 344 (1972).

112. *Id.* at 346.

113. 7 Mich. E.R.C. Lab. Op. 614 (1972).

114. *Id.* at 616-18.

115. 7 Mich. E.R.C. Lab. Op. 11 (1972).

academic faculty was found to be the most appropriate bargaining unit. In reaching that conclusion, MERC applied an integration of work test. The Commission was of the opinion that the successful execution of the University's function required that all the faculty work together, notwithstanding the fact that they had different job classifications. In *Michigan State University*¹¹⁶ MERC relied on the integration test and rejected the union's attempt to fragment employees of the University's physical facilities. MERC held that job classifications were not determinative, and that the appropriate unit was all employees employed in the operation and maintenance of the University's physical plant.

In New York, PERB has taken the same position with respect to unit fragmentation as was taken in Michigan by MERC. In *Copiague Public Schools*¹¹⁷ PERB, in refusing to certify a union as the exclusive bargaining agent, held that if employees had a "community of interest"¹¹⁸ the union could not fragment them. Moreover, PERB held that the employees had a community of interest because they all received civil service benefits. This case is significant because PERB was willing to create a presumption of community of interest among all employees employed under civil service rules and regulations.¹¹⁹ In effect, this shifted to the union the burden of proving that the employees sought to be organized did not have a community of interest with a larger group of employees.

It is not enough to prove that the work rules or educational qualifications of the employees are dissimilar. To sustain its burden the union must offer some evidence which indicates that there is some real conflict among the various groups of employees, and that the conflict is so intense that it is virtually impossible for one union to represent the employees' interests at the bargaining table.¹²⁰

While the labor relations boards in both Michigan and New York have taken steps to enlarge the bargaining units, neither has abandoned the community of interest requirement. However, both have

116. 1 Mich. E.R.C. Lab. Op. 176, 177 (1966); County Service Center, 1 Mich. E.R.C. Lab. Op. 112 (1966).

117. 5 N.Y.P.E.R.B. 4034 (1972).

118. See note 122 and accompanying text *infra*, discussing the "community of interest" doctrine.

119. 5 N.Y.P.E.R.B. at 4035. See also *Union Free School Dist. No. 13*, 4 N.Y.P.E.R.B. 4310 (1971). In *School District No. 13*, PERB held that in determining an appropriate unit and community interest, the factors considered include negotiating authority of the employer and the employer's ability to provide quality service to the public. It attempts to define the broadest possible unit which will permit an employer to exercise its negotiating authority, but yet provide a service to the public. *Id.* at 4333-34.

120. Board of Cooperative Educational Services, 4 N.Y.P.E.R.B. 4338 (1971).

begun to view the community of interest differently than they did in the early stages of their operation. Under the current scheme, community of interest is determined by either the integration of the employer's work or its fringe benefit plan.¹²¹ Both factors de-emphasize job classifications.

What Is a Community of Interest?

Community of interest is a difficult concept to define. Over the years it has been developed and relied upon by the NLRB to determine which employees should be included in an appropriate bargaining unit. The Board will not find that a community of interest exists if certain factors are not present. The requisite factors are: (1) functional integration of work process; (2) common supervision of employees; (3) similar skills of employees; (4) interchangeability of employees; (5) a common scheme of fringe benefits offered to the employees.¹²² Thus it is apparent that the new position taken by MERC and PERB represents an adoption of the NLRB's initial definition of community of interest.

The NLRB, however, has gradually broadened its definition of the most appropriate unit. In doing so it has not abandoned the community of interest requirement. In its search for a community of interest, the Board has begun to place primary emphasis on factors different from those used in the mid-1960's. In *Gray Drug Stores, Inc.*,¹²³ for example, the Board rejected the union's contention that a multi-store, countywide unit was appropriate. A Board majority there held that the appropriate unit was all stores within a two-county area. In reaching that decision it relied on the following factors: (1) functional integration of the employer's operation; (2) interchange of employees' supervision; and (3) geographical proximity. On these bases the Board held that the appropriate unit should be coextensive with the employer's administrative entity, which was all stores within a two-county area.

Gray Drug Stores clearly illustrates that the NLRB has developed a broader notion of community of interest. The emphasis is no longer placed on the employees and their right to participate in internal union affairs or internal harmony within the union. Under the new scheme the important factors are managerial control and the administration of labor relations. If there is local management, the

121. See notes 111-20 and accompanying text *supra*.

122. See *Curcie Brothers, Inc.*, 146 N.L.R.B. 380 (1964); *Sylvania Electric Products, Inc.*, 135 N.L.R.B. 768 (1962).

123. 80 L.R.R.M. 1449 (1972); *accord*, *Twenty-First Century Restaurant Corp.*, 192 N.L.R.B. 881 (1971); *Waiakamilo Corp.*, 192 N.L.R.B. 878 (1971).

NLRB may very well find that a single plant constitutes an appropriate unit.¹²⁴ If the managerial control is centralized and the employer operates several outlets, the unit will be broader than one plant, store or installation.

Some states have enacted legislation ensuring the same results regarding appropriate units that have emerged in the private sector. Both Pennsylvania and New York have statutes¹²⁵ that will have this effect if the public employees labor relations commissions, in their decisions, give greater consideration to managerial control. Hence, in a school district where there is only one superintendent and one administrative office, the bargaining unit would be district-wide.

Hawaii, however, currently offers the best model for determining bargaining units. Under its statute, bargaining units along departmental, occupational or even installation lines are prohibited. There cannot be more than 13 bargaining units in the state. The unit is coextensive with the employer that has the ultimate control over the employees. Clearly, the position taken in Hawaii dictates a much broader unit than is required by the NLRB. While the standards established by the NLRB for determining unit composition are significant indicators of the appropriateness of a given unit, it is submitted that the approach taken in Hawaii is more compatible with the problems present in the public sector.

IV. CONCLUSION

In recent years there has been a significant attitudinal change by public employers and the general public with respect to public sector collective bargaining. Public officials no longer look upon all forms and degrees of collective bargaining as antagonistic to the well-being of the political entity. Moreover, unions are encouraged to help public management promote many political ideas to the electorate that are totally unrelated to collective bargaining. Accordingly, the dispute between public management and labor no longer concerns the legitimacy of public employee unionism, but rather the schemes and models necessary to facilitate orderly collective bargaining.

Despite the tacit agreement between public employer and union on motives and goals it is apparent that public sector bargaining has been retarded. The most compelling reasons are the inability of union and employers to determine "what to bargain about" and "who to bargain with." This state of confusion, coupled with legislative inaction

124. Bank of America Nat'l Trust & Sav. Ass'n, 80 L.R.R.M. 1081 (1972).

125. See N.Y. CIV. SERV. LAW § 207 (McKinney 1973); PA. STAT. ANN. tit. 43, § 1101.-604 (Supp. 1973).

by the major states, will continue to cause some turbulence in public sector labor relations.

It is suggested here that unless and until the collective bargaining statutes identify both the "real employer" and the scope of bargaining, unions and public employers will continue to encounter problems at the bargaining table. To resolve the problem of identification, it is suggested that the statutes define the employer as "all governmental entities which can by practice, or through rules and regulations, affect any terms and conditions of employment." In many instances, this statutory test would compel the state labor boards and courts to conclude that two or more governmental units constitute a joint employer. Use of the joint employer concept reduces the number of disputes concerning "what to bargain about." The scope of bargaining expands as the definition of employer is broadened. As a result, the number of subjects deemed to be outside of the scope of bargaining is reduced to a minimum.

An additional benefit of the joint employer approach is to eliminate multi-stage bargaining. This abuse occurs where a court or state labor board defines the employer as the immediate employing entity only, and fails to include other agencies that affect terms and conditions of employment. For example, the union will bargain an agreement with the fire department or police department. Following the tentative agreement, the union will petition the legislative body for additional benefits. At the same time, the local employer is attempting to have the legislative body reduce the concessions already granted to the union. This disruptive tactic will virtually disappear if the employer is properly defined, since the legislative branch, as joint employer, will have participated directly in the bargaining process. Consequently, there will be little need to renegotiate the agreement.

It is clear that unit fragmentation impedes collective bargaining in the public sector. State labor boards and courts must begin to make every reasonable effort to broaden the bargaining units, where to do so is not prohibited by statute. In broadening the bargaining unit there must be some balancing of the employees' rights to participate in internal union affairs against the public interest in an orderly and stable labor relations practice. To this end, the decision maker should place primary reliance on the same factors which the NLRB considered important in *Gray Drug Stores*.¹²⁶

126. 80 L.R.R.M. 1449 (1972); See p. 309 *supra*.